

grounds of error of law where the ouster of the court's jurisdiction to quash the orders and decisions of inferior tribunals has been clearly limited to errors of jurisdiction. The instant case is but one of them, at least in part. Whatever doubts there remained have now been removed by the Privy Council judgment in *South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Minerals Products Manufacturing Employees Union*.⁽⁵⁾ The section considered was a different section, the then section 29(3)(a) (now section 32(3)(a)) but it is clear that the Privy Council considered that part which read "quashed or called in question in any Court of Law" to uphold the "powerful dissent" of Geoffrey Lane L.J. in *Pearlman v. Keepers and Governors of Harrow School*⁽⁶⁾ at page 74, which has now become the law in England with its approval in *In re Racal Communications Ltd.*⁽⁷⁾ The judgment of the Privy Council clearly rules that

"... if the inferior tribunal has merely made an error of law which does not affect its jurisdiction and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective. In *Pearlman v. Keepers and Governors of Harrow School* (1979) Q.B. 56, 70, Lord Denning M.R. suggested that the distinction between an error of law which affected jurisdiction and one which did not should now be 'discarded'. Their Lordships do not accept that suggestion. They consider that the law was correctly applied to the circumstances of that case in the dissenting opinion of Geoffrey Lane L.J. when he said at p. 74:

'... the only circumstances in which this court can correct what is to my mind the error of the (County Court) judge is if he were acting in excess of his jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of 'structural alteration'... or addition.'"

The only material difference between section 29(3)(a) and section 16A(5) of the Act is the presence of the word "quashed" in the former section. In our view, having regard to the decision in *Anisimic*, the ouster provision in section 16A(5) is sufficiently wide to remove *certiorari* based on an allegation of an error of law.

The time has surely come for a critical examination of the very many applications that have been made in the past and still await decision either at first instance or on appeal. The doctrine of precedent and commonsense as well as the practical considerations of cost and time must mean that where the application is based on an error of law, it should now be abandoned, unless of course the applicant can make out a case that such an error is in fact and in law an error of jurisdiction.

But very clearly the learned judge was right in finding no error of law, and though he did not say so, it is implicit in his decision, no error of jurisdiction.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: K.L. Rekhray & Co.; Rajendra & Teik Ee.

A

PALANIAPPA CHETTIAR v. LETCHUMANAN CHETTIAR

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.J.J.) October 1, 1980 & March 30, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 180 of 1979]

Land law — Caveat — Application for removal of caveat — Considerations in favour of maintaining caveat outweigh those in favour of removing it.

B

In this case the respondent was the executor of the estate of his father, who before his death was the Karta or manager of a Hindu Joint Family consisting of the deceased and the respondent and the appellant, who were step-brothers. Probate was granted to the respondent subject to the condition that an order of court should be obtained before disposal or distribution of any property bequeathed under the will. The appellant in other proceedings had alleged mis-management of the properties by the late father and accounts had been ordered to be filed. The respondent applied to court for the sale of a piece of land belonging to the estate and with the appellant's consent an order was made. Subsequently it was discovered that the title of the land had been under caveat by the appellant. The respondent applied for the caveat to be removed. The appellant had stated that he would agree to the removal of the caveat if the Karta's 1/3 share of the proceeds of sale be kept on a fixed deposit until the accounts were taken. The respondent did not agree and the learned Judge made an order for the caveat to be removed. The appellant appealed.

C

D

Held, allowing the appeal: in the circumstances of this case, the considerations in favour of maintaining the caveat outweigh any consideration that had been shown in favour of removing it. The caveat should therefore be restored.

E

Cases referred to:-

- (1) *Palaniappa Chettiar v. Lakshamanan Chettiar* [1979] 1 M.L.J. 119.
- (2) *Arunasalam Chettiar & Ors. v. Palaniappa Chettiar* [1974] 2 M.L.J. 133.

FEDERAL COURT CIVIL APPEAL.

F

R.R. Sethu for the appellant.

Atma Singh Gill for the respondent.

Cur. Adv. Vult.

G

Syed Othman F.J. (delivering the judgment of the Court): The respondent applied to the High Court at Seremban for sale of a piece of land (Grant 8457, Lot 538, Port Dickson), part of the estate of the deceased father of the parties who are step-brothers. With the appellant's consent the order was made. It was later discovered that the title of the land had been under caveat since 1951 and extended with consent by the respondent in 1958. The respondent applied for the caveat to be removed to facilitate transmission of the title. The application was granted. The appellant appealed against the removal of the caveat. We allowed the appeal. These are our reasons.

H

The affidavit accompanying the application for sale of the land by the respondent can be briefly stated thus: the respondent was executor of the estate of the father, who before his death was the Karta or manager of the Hindu Joint Family of the PL.AR. Firm of Port Dickson which consisted of the deceased and the two step-brothers. On January 22, 1977 the learned trial judge ordered that the probate of the said will be granted to the respondent except that the testator's one-third share, i.e. the Joint Hindu Family of PL.AR. Firm of Port Dickson be excluded and that this 1/3 share shall form part of the deceased's estate in

I

intestacy. The Federal Court on September 24, 1977 allowed the appeal⁽¹⁾ and amended the Order to read:

"Probate granted subject to the proviso that before disposing of or distributing any property bequeathed under the will or the proceeds of such property, there shall be an Order of Court to that effect."

The respondent also undertook, after sale and paying off taxes and all outgoings on the 3 shares of the estate, to pay the appellant's share to him or to his solicitors, or otherwise to the Court or Public Trustee in trust for the appellant. The reason given for the application for sale was that the land had been seized and put into the hands of the Receiver since the later part of 1964 and his late father had lived on borrowed money and since the death of the father he too had been living by borrowing money for maintaining his mother, wives and children.

With the consent of the appellant the learned trial judge made the order. After the order, the respondent discovered that the appellant in the course of litigation with their late father in Seremban High Court Civil Suit No. 34 of 1951 had lodged a caveat against the title and the caveat had been extended by consent order dated March 17, 1958 until further order of the court. None of the counsel appearing in the originating summons applying for sale of the land seemed to be aware of the caveat. On becoming aware of the old caveat the respondent's solicitors wrote on April 19, 1979 a letter to the appellant's solicitors requesting them to consent to the withdrawal of the caveat. The appellant's solicitors replied alleging mismanagement of the properties by the late father during his Kartaship and stating that the appellant would agree to withdraw the caveat if the Karta's $\frac{1}{3}$ share from the proceeds of sale would be put in a bank on fixed deposit until final account was taken and the amount to which appellant was entitled from the Karta's estate was ascertained. Further correspondence did not alter the appellant's stand in the matter.

According to an affidavit of the respondent the accounts as ordered by the Privy Council⁽²⁾ have long been filed and the appellant has failed and refused to take accounts or to challenge them even though he is in the country now.

The respondent on June 30, 1979 took out a Summons in Chambers seeking, as executor of the estate, that the caveat be removed.

The main parts of the affidavit in reply by the appellant are as follows: The order of the court dated February 5, 1979 cannot affect the caveat entered in Seremban High Court Civil Suit No. 34 of 1951. On March 20 and 21, 1951 prior to the Seremban High Court action he lodged caveats on 35 titles including Grant 8457. He consented to the removal of the caveats on the numerous properties mentioned in the court order of March 17, 1958. He considered the land held under Grant 8457 to be the most valuable of all the properties and the caveat on it together with caveats in respect of 4 Grants for 3 pieces of land in Port Dickson and one in Seremban would be sufficient securities for the amounts due to him in Seremban High Court Civil Suit No. 34 of 1951. In the action he sought a declaration that all properties held by his deceased father or step-mother to belong to the

A Joint Family, order for an account to be taken of the amount due to him, order for an inquiry to ascertain what part of the amount due to him should be paid to the Joint Family estate and what part thereof should be paid by the deceased father. He makes various allegations of wrongful sale of the property by the deceased father and his brother (the respondent), wrongful spending of money out of the assets of PL.AR. Firm, large sums borrowed by the respondent from the firm after 1950 which should be accounted to him.

In vacating the caveat the learned trial judge gave his reasons as follows:

C "In my view the defendant's refusal to vacate the caveat was not justifiable. He was now placing obstacles to thwart the order to which he had consented on February 5, 1979. Mr. A.D. Rajah for the defendant also submitted that the present application to vacate the caveat should have been made in Civil Suit No. 34 of 1951 and not in the present Originating Summons because the caveat was entered in relation to the litigation commenced in the Civil Suit. With respect, I do not think there is any substance in this contention as the subject-matter of the litigation in Civil Suit No. 34 of 1951 also related to the land which was ordered to be sold in the present Originating Summons. In the circumstances therefore I made an order in terms of the plaintiff's application for the removal of the caveat."

E From the above it is clear that the only reason given for removing the caveat was that the consent given in the originating summons should also be taken as consent to remove the caveat without the need to consider the grounds for the caveat having been lodged under the Civil Suit. We are inclined to agree that the learned trial judge should have considered these grounds by themselves before ordering its removal, as it was not disputed that when the consent was given the parties' minds were not directed to the caveat. Indeed the trial court itself was unaware of the caveat. F The consent given in the circumstances must be treated as being subject to the legal limitations and encumbrances under the title, more so when in applying for the order of sale no mention was made of any limitation and encumbrance. We also consider that the trial court should have dealt specifically with the appellant's offer that he would only agree to the withdrawal of the caveat if the Karta's $\frac{1}{3}$ share of the proceeds of sale be kept in a bank on a fixed deposit until the accounts are taken, having regard to the Civil Suit which is still pending and to the fact that the Privy Council has ordered the taking of accounts. Here in seeking the order for sale the respondent did not show how he was going to dispose of the Karta's share. He did not show what were his objections to depositing the Karta's share in the bank until disposal of the civil suit. There is nothing to show that he was wholly entitled to it. He only met the appellant's request in his affidavit with vehement words rather than acceptable reasons by labelling the request as vicious, unreasonable and illogical. Further in considering the appellant's request, enquiry should have been made whether it would have been sufficient to deposit in the bank a portion of the Karta's share instead of the whole.

It is accepted that the respondent has rendered accounts. The appellant might be at fault for delaying the taking of accounts. But the respondent himself has not shown if he has taken steps to get the appellant to expedite the taking of accounts and whether

or not the accounts so far rendered are in favour of or against the appellant's claim that a considerable sum was due to him from the Karta's share. It is to be noted that the appellant was not concerned with the respondent's share. There is no dispute to the appellant's claim that of all the properties, the property concerned is the more valuable piece. The respondent himself has stated that measuring 16a.1r.0lp. it is now priced at least \$1,239,213.50, i.e. \$1.75 per sq. ft.

We find that there are many factors concerning the caveat which were not considered and from the evidence that is available the considerations in favour of maintaining the caveat outweigh any consideration that has so far been shown to be in favour of removing it. We therefore restored it. But in allowing the appeal we must remind the parties that it does not mean that the respondent cannot come back and make a fresh application. Indeed if he has good new grounds he may re-apply to the court for its removal.

Appeal allowed.

Solicitors: Sethu, Ghazali & Gomes; Gill and Tang.

GOON KWEE PHOY v. J. & P. COATS (M) BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman F.J. & Abdoolcader J.) January 28 & April 2, 1981]

[Ipoh — Federal Court Civil Appeal No. 173 of 1980]

Industrial Law — Employment of workman terminated on ground of redundancy — Representations made by workman on his dismissal without just cause or excuse — Reference to Industrial Court — Finding that there was no redundancy which would justify company dismissing or terminating employment of workman — Compensation in lieu of reinstatement awarded by Industrial Court — Award quashed by High Court on ground that Industrial Court had no jurisdiction to conclude that the termination of services of workman was a dismissal — Appeal allowed in Federal Court — Termination without just cause of dismissal is dismissal in respect of which Industrial Court can order reinstatement or award compensation in lieu — Industrial Relations Act, 1967, s. 20(1).

Administrative Law — Certiorari — Award of Industrial Court — Whether Industrial Court has jurisdiction to conclude that termination of services of workman was dismissal — Termination without just cause of dismissal is dismissal in respect of which Industrial Court can order restitution or award compensation in lieu — Industrial Relations Act, 1967, s. 20(1).

In this case the appellant had his employment with the respondent company terminated on the ground of redundancy. The appellant made representations alleging that he had been dismissed without just cause or excuse. The Minister eventually referred the representations to the Industrial Court. The Industrial Court held on the evidence that there was no redundancy which would justify the company dismissing or terminating the employment of the workman. In the circumstances of the case the Industrial Court did not order reinstatement of the workman but made an award of compensation in lieu of the reinstatement asked for. The company applied to the High Court for the award to be quashed. The High Court agreed that there was no redundancy but the learned judge held that the employment of the workman has been terminated in accordance with the contract of employment and that an employer was entitled to do this without making himself liable under the Industrial Relations Act, 1967 to an order of reinstatement or compensation in lieu of reinstatement. The learned judge therefore quashed the award. The appellant appealed.

Held: (1) having regard to the company's pleadings in the Industrial Court, the High Court was not correct to consider the ground of termination by due notice which had not been relied on in the Industrial Court;

(2) even assuming that it was possible for the High Court to consider the ground, termination by due notice but without just cause or excuse is a dismissal in respect of which an Industrial Court can make an order for reinstatement or an award of compensation in lieu of reinstatement;

(3) on the finding that there was no redundancy in this case the conclusion was inevitable that the termination was without just cause or excuse advanced and therefore without just cause or excuse.

Cases referred to:-

- (1) *Langston v. Amalgamated Union of Engineering Workers & Anor.* [1974] 1 W.L.R. 185.
- (2) *Hotel Jaya Puri Berhad v. National Union of Hotel, Bar and Restaurant Workers & Anor.* [1980] 1 M.L.J. 109, 114.
- (3) *Thompson v. Goold & Co.* [1910] A.C. 409, 420.
- (4) *Reg. v. National Insurance Commissioner, ex parte Hudson* [1972] A.C. 944, 1005.
- (5) *Attorney-General v. Great Eastern Railway* (1880) 5 App. Cas. 473, 478.
- (6) *South-East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165.
- (7) *P. Raman v. Chairman, Board of Governors, Sekolah Rendah Jenis Kebangsaan Gopeng & Anor.* [1973] 2 M.L.J. 161, 162-163.
- (8) *Haji Ariffin v. Government of Pahang* [1969] 1 M.L.J. 6, 10, 15, 16.
- (9) *Shrinivas Ganesh v. Union of India*, A.I.R. 1956 Bom. 455.
- (10) *P.L. Dhingra v. Union of India* A.I.R. 1958 S.C. 36, 40.
- (11) *Gnanasundaram v. Public Services Commission* [1966] 1 M.L.J. 157, 159.
- (12) *Reg. v. Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union* [1966] 2 Q.B. 31.
- (13) *Chartered Bank, Bombay v. The Chartered Bank Employees' Union* A.I.R. 1960 S.C. 919.
- (14) *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, 171.
- (15) *Dr. A Dutt v. Assunta Hospital* [1981] 1 M.L.J. 304.
- (16) *London Transport Executive v. Clarke* [1980] I.C.R. 532, 538-539.

HIGH COURT.

V.T. Nathan for the applicant.

D.P. Xavier for the respondent.

Cur. Adv. Vult.

Gunn Chit Tuan J.: This originating motion was an application by J & P Coats (M) Bhd. (hereinafter referred to as "the company") for an order of *certiorari* to remove into the High Court to quash Industrial Court Award No. 66/79 ordering the company to pay one Mr. Goon Kwee Phoy (hereinafter referred to as "the workman"):-

- (a) as compensation in lieu of reinstatement the total remuneration he would have earned from his salary from January 1978 to May 31, 1979.
- (b) any bonus, allowances or benefits due under the Company's Pension Scheme or otherwise from January 1978 to May 31, 1979.
- (c) as compensation for loss of future earnings, the total remuneration based on his last drawn salary calculated from June 1, 1979 to April 22, 1980.